

On October 8, 2007, claimant sought treatment with Dr. Schaper with complaints of right leg pain which the doctor suspected was caused by a herniated disk in claimant's low back. Dr. Schaper took claimant off work for four weeks in October 2007 and the

respondent refused to authorize a recommended MRI of claimant's low back or pay temporary total disability compensation. Respondent argued claimant's low back complaints were due to a preexisting condition.

A preliminary hearing was held on January 14, 2008, and the Administrative Law Judge (ALJ) entered a Temporary Order which noted "it appears he remains temporarily unable to return to work, but it is not yet clear how his back complaints are causally connected to his recent leg injury." Nonetheless, the ALJ ordered that temporary total disability should be continued and "the matter of the MRI remains pending until a further medical opinion is received."

Respondent requests review of whether claimant sustained an accidental injury arising out of and in the course of employment with respondent. Respondent argues claimant's current back problems are due to a preexisting condition and therefore the ALJ's Order should be reversed.

Claimant requests the case be remanded for authorized treatment with Dr. Schaper including a referral for the recommended MRI.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

During childhood claimant was struck by a car and suffered serious injuries to his left foot and right leg which resulted in multiple surgeries and left claimant with a permanent limp. Claimant also suffered a work-related low back injury sometime in the 1980's while working for Winn Dixie in Florida and was diagnosed with bulging disks. As a result of that injury claimant received a disability rating and permanent restrictions. But when claimant went to work for respondent he indicated that he was not having any low back problems nor pain radiating into his leg.

Claimant began working as a floor sander for respondent in 2005. His job duties included running an edger (electric orbital sander) along the walls where the drum sander was not able to get. This required him to be on his knees. As previously noted, between August 2005 and August 28, 2006, claimant experienced right knee problems and ultimately received a right total knee replacement on September 8, 2006, performed by Dr. Mendlick. Claimant had sought treatment on his own and the medical treatment was apparently provided by his health insurance. A preliminary hearing was then held on December 14, 2006, and the ALJ determined claimant's knee problems were work related. The ALJ further ordered respondent to pay temporary total disability compensation until claimant was released at maximum medical improvement. An authorized treating physician was not designated in the Preliminary Decision dated December 27, 2006.

Dr. Mendlick continued to provide treatment for claimant's right knee. When claimant complained of low back pain Dr. Mendlick obtained an MRI of claimant's lumbar spine on September 22, 2006, which revealed disk bulging at several levels in claimant's lumbar spine. Dr. Mendlick treated claimant's low back with a series of epidural steroid injections. When Dr. Mendlick suggested claimant be referred to a spine surgeon respondent referred claimant to Dr. R. Christopher Glattes for diagnosis, an opinion on whether claimant's back complaints were related to work for respondent or a natural progression of claimant's preexisting back condition and whether medical treatment was necessary.

In February 2007, Dr. Glattes conducted a physical examination of claimant and reviewed the September 22, 2006 MRI. Dr. Glattes diagnosed claimant with lumbar degenerative disk disease, opined that claimant's back condition was a continuation of his preexisting condition and that no further medical treatment for claimant's low back was recommended.

Dr. Mendlick apparently retired and the parties agreed that Dr. Schaper would provide treatment, if necessary for claimant's right knee complaints. On October 8, 2007, claimant saw Dr. Schaper with complaints of right leg pain. Dr. Schaper examined claimant and suspected that claimant had a herniated lumbar disk which was causing the pain radiating from claimant's right hip into his right foot and ankle. Dr. Schaper further noted that claimant's condition had changed as he previously did not have strong signs of sciatica and now has a reduced ankle jerk. Dr. Schaper concluded claimant needed a lumbar MRI to determine if he had a disk herniation and took claimant off work for four weeks. In a letter dated October 17, 2007, Dr. Schaper commented on claimant's back condition in the following manner:

As best I can tell, he did have workman's comp coverage in the past and this is what he reported to me. If workman's comp had never covered his back in the past, I would not consider his current claim to be work related, as I think it is a continuation and exacerbation of his previous back problems.¹

Dr. Edward Prostic examined claimant on April 7, 2006, at the request of claimant's attorney. Claimant complained of pain in the center of his low back at his waist level with radiation down the right leg to the lateral foot. Dr. Prostic reported that claimant did not have objective evidence of radiculopathy but his examination was "confused" because of claimant's numerous preexisting leg problems. Dr. Prostic recommended a new MRI be performed to determine if there is a lesion capable of causing S1 radiculopathy. Dr. Prostic further opined that, if so, it would most likely be the natural progression caused or contributed to by claimant's employment.

¹ P.H. Trans. (Jan. 3, 2008), Resp. Ex. A.

The claimant testified that since his knee replacement he has been having pain in his lower back radiating into his right leg. Claimant also testified that his right knee swells and he cannot straighten his leg. He further testified that although he has had a limp since his childhood injury, he now walks with a more severe limp which he attributes to the surgery on his right knee. As a result of the recurrent swelling in his right knee claimant has also made numerous trips to the emergency room. And claimant concluded that his symptoms have worsened.

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2007 Supp. 44-551(i)(2)(A) states in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

In *Allen*², the Kansas Court of Appeals stated:

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

² *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.³

The parties had agreed that Dr. Schaper was authorized to provide treatment, if necessary, for claimant's right leg. When claimant later sought treatment for right leg pain, Dr. Schaper took claimant off work but he suspected the claimant's right leg pain was caused by a herniated disk in claimant's low back. After a preliminary hearing on January 3, 2008, the ALJ entered a Temporary Order which provided:

From another preliminary hearing on January 3, 2008 on issues of temporary total disability and a possible MRI of claimant's back, it appears he remains temporarily unable to return to work, but it is not yet clear how his back complaints are causally connected to his recent leg injury. So it is ordered that temporary total disability at \$440.00 as previously ordered should be continued until further order and the matter of the MRI remains pending until a further medical opinion is received.

It is difficult to determine the ALJ's intention in this matter. Reading solely from the four corners of the ALJ's January 14, 2008, Temporary Order, it would appear that the ALJ found the back claim was not compensable but took the matter under advisement pending additional medical evidence. If this is correct, then the award of temporary total disability compensation is inconsistent and confusing as Dr. Schaper took claimant off work for a condition he believed was caused by a herniated disk in claimant's low back. And he had recommended an MRI of claimant's low back to confirm that diagnosis. On the other hand if the ordered temporary total disability compensation was for right leg complaints related to the knee or knee surgery then the Temporary Order would not give rise to a jurisdictional issue. The intent of the ALJ is further confused by the comment that the recommended MRI is "pending until a further medical opinion is received." This also suggests that the Temporary Order is not a final order and the ALJ was reserving judgment on the compensability issue and was awaiting further medical evidence before deciding whether the back complaints were work-related. If that is the case then such order would not give rise to a jurisdictional issue. But the Temporary Order did not specifically order that an independent medical examination be conducted even though at the conclusion of the preliminary hearing the ALJ indicated that he might order a neutral physician to examine claimant.

The Temporary Order as written simply does not provide answers to the question of whether the Board has jurisdiction to review this appeal. Consequently, this matter is remanded to the ALJ for clarification and with directions that he provide specific findings of fact and conclusions of law on the issues presented to him at the preliminary hearing.

³ See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

Specifically, did claimant suffer personal injury or injuries to his low back by accident arising out of and in the course of his employment with respondent? Was the compensability of the back injury taken under advisement pending further medical evidence? Is claimant temporarily and totally disabled as a result of the work-related knee injuries?

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁴ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁵

WHEREFORE, it is the finding, decision and order of this Board Member that the Temporary Order of Administrative Law Judge Robert H. Foerschler dated January 14, 2008, is remanded to the ALJ for specific findings, conclusions and orders.

IT IS SO ORDERED.

Dated this _____ day of March 2008.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Timothy A. Alvarez, Attorney for Claimant
Denise E. Tomasic, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge

⁴ K.S.A. 44-534a.

⁵ K.S.A. 2007 Supp. 44-555c(k).